Supreme Court, U.S.
FILED
AUG 24 2010
OFFICE OF THE CLERK

169

(2)

No. 10-128

IN THE

Supreme Court of the United States

DANIEL RAY UNGER,

Petitioner

v.

GREG TAYLOR, JOHN SMITH, BRYAN CHASON, ZAK MONTOYA, CARL DAVIS, and ANDERSON COUNTY, TEXAS,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

J. KEITH STANLEY
Counsel of Record
C. VICTOR HALEY
W. WADE FLASOWSKI
FAIRCHILD, PRICE, HALEY & SMITH
P.O. Drawer 631668
Nacogdoches, Texas 75963
(936) 569-2327
kstanley@fairchildlawfirm.com

Counsel for Respondents

231830

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

I. Whether Petitioner has presented compelling reasons to grant the Petition, where the Fifth Circuit's Opinion affirming the District Court ruling granting judgment in favor of the Respondents as to Petitioner's right to travel claim does not conflict with a decision of this Court or a Court of Appeals, and where the Petitioner does not claim that the Fifth Circuit ruling implicates an important federal question that has not been settled by this Court.

II. Whether the Petitioner has presented compelling reasons to grant the Petition, where the Fifth Circuit's Opinion affirming the District Court's judgment in favor of the Respondents and rejecting Petitioner's claim sovereign immunity by birthright does not conflict with a decision of this Court or a Court of Appeals, and where Petitioner fails to demonstrate that the Fifth Circuit's ruling implicates an important federal question that has not been settled by this Court.

III. Whether the Petitioner has presented compelling reasons to grant the Petition, where the Fifth Circuit's Opinion affirming the District Court judge's refusal to recuse himself does not conflict with a decision of this Court or a Court of Appeals, and where the Petitioner does not claim that the Fifth Circuit ruling implicates an important federal question that has not been settled by this Court.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Cited Authorities	iv
Introduction	1
Statement of the Case	3
Statement of the Facts	5
Reasons for Denying the Petition	7
I. Petitioner's Assertion of Sovereign Immunity is Not Relevant, Misguided and Not Compelling	7
a. Sovereign Immunity Bears no Relevance to the Causes of Action Brought Against the Respondents	7
b. Petitioner's Claim of Sovereign Immunity Under 28 U.S.C. §§ 1602-1611 is Misguided	10
II. Petitioner's Right to Travel Claim was Appropriately Dismissed as a Matter of Law by the District Court	13

Contents

	Page
III. Petitioner's Arguments Ignore the Qualified and Judicial Immunity Framework	15
a. Qualified Immunity	16
b. Judicial Immunity	18
IV. Petitioner Improperly Assumes that the Filing of an Unsworn Declaration Alleging Bias and Prejudice Requires Recusal as a Matter of Law	21
Conclusion	23

TABLE OF CITED AUTHORITIES

Page

Cases

Ammons v. Baldwin,
705 F.2d 1445 (5th Cir. 1983) 20

Anderson v. Creighton,
483 U.S. 635, 97 L. Ed. 2d 523,
107 S. Ct. 3034 (1987) 16, 17

Babb v. Dorman,
33 F.3d 472 (5th Cir. 1994) 16

Ballard v. Wall,
413 F.3d 510 (5th Cir. 2005) 19

Beck v. Ohio,
379 U.S. 89, 85 S. Ct. 223,
13 L. Ed. 2d 142 (1964). 8

Boyd v. Biggers,
31 F.3d 279 (5th Cir. 1994) 18

Cleavinger v. Saxner,
474 U.S. 193 (1985) 19

Davis v. Bd. of Sch. Comm'rs of Mobile County,
517 F.2d 1044 (5th Cir. 1975) 22

Delaware v. Prouse,
440 U.S. 648 (1979) 8, 9

Cited Authorities

	Page
Flores v. City of Palacios, 381 F.3d 391 (5th Cir. 2004)	8
Gibson v. P.A. Rich, 44 F.3d 274 (5th Cir. 1995)	16
Henderson v. Dep't of Pub. Safety & Corr., 901 F.2d 1288 (5th Cir. 1990)	21
Irving v. State, 2002 Tex. App. LEXIS 4404 (Tex. App. Corpus Christi June 20, 2002)	9
Jones v. Helms, 452 U.S. 412 (1981)	14
Malina v. Gonzalez, 994 F.2d 1121(5th Cir. 1993)	19
Malloy v. Briggs, 475 U.S. 335, 106 S. Ct. 1092 (1986)	16
Matassarin v. Lynch, 174 F.3d 549 (5th Cir. 1999)	21
Mireless v. Waco, 502 U.S. 9 (1991)	19
New York v. Payton, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980)	9

Cited Authorities

Page

Nite v. State,
882 S.W.2d 587, 1994 Tex. App. LEXIS 2102
(Tex. App. Houston 1st Dist. 1994) 9

Ohio v. Robinette,
519 U.S. 33(1996) 9

Pierson v. Ray,
386 U.S. 547 (1967) 19

Saucier v. Katz,
533 U.S. 194 (2001) 17

Sorenson v. Ferrie,
134 F.3d 325 (5th Cir. 1998) 16

Stump v. Sparkman,
435 U.S. 349 (1978) 18, 19

Tores v. State,
518 S.W.2d 378 (Tex. Crim. App. 1975) 9

United States v. Causey,
834 F.2d 1179 (5th Cir. 1987) 9

United States v. Costner,
646 F.2d 234 (5th Cir. 1981) 8

Williams v. Fears,
179 U.S. 270 (1900) 13, 14

Cited Authorities

	Page
Whren v. United States, 517 U.S. 806 (1996)	9
Statutes	
28 U.S.C. § 144	21
28 U.S.C. § 455	21
28 U.S.C. § 455(a)	21
28 U.S.C. § 1330	10
28 U.S.C. §§ 1602-1611	1, 2, 10, 11
42 U.S.C. § 1983	9
TEX. TRANSP. CODE § 521.021	9
TEX. TRANSP. CODE § 547.605	9
TEX. TRANSP. CODE § 601.051	9
TEX. TRANSP. CODE ANN. § 543.001	9
TEXAS PENAL CODE ANN. § 46.02(a)	17
Rules	
SUP. CT. R. 10	1, 7
SUP. CT. R. 10(A)-(C)	1

INTRODUCTION

Petitioner has presented no "compelling reasons" for his Petition for a Writ of Certiorari to be granted ("Petition"). *See* Sup. Ct. R. 10. Specifically, Petitioner fails to demonstrate that the Fifth Circuit's March 2, 2010 Opinion ("Opinion") is in conflict with a decision of this Court or another Court of Appeals or that the Fifth Circuit decided an important federal question that has not been settled by this Court. *See* Sup. Ct. R. 10(a)-(c). In fact, the Petitioner brings forth issues concerning the basic constitutional right to travel, an assertion of sovereign immunity, and an issue of recusal, all of which are either well settled issues of law, non-compelling (un-important issues) and/or concern unrecognized causes of action. Therefore, the petition for writ should be denied.

At a glance, the issues presented before the Court appear unaddressed, original and potentially compelling. Petitioner's central contention is that he, by lineage or birthright, is a member of the "posterity of the Sovereign American People" and, therefore, is immune from the jurisdiction of the courts of the United States and the States in accordance with the Foreign Sovereign Immunities Act as codified under 28 U.S.C. §§ 1602 -1611. Petitioner's claim of sovereign immunity is outrageous and misguided. Notwithstanding the fact that the Petitioner has failed to identify the "Sovereign American People" and failed to provide any evidence of his affiliation with the "Sovereign American People" or how such membership entitles Unger to immunity, the plain language of Section 1602 outlines the "[f]indings and declaration of purpose" of the Act. 28 U.S.C. § 1602.

There should be no question that Sections 1602 through 1611 apply only to a "foreign state" or an "agency or instrumentality of a foreign state." *Id.* Clearly, Petitioner, an American citizen and Texas resident, does not fall within the class of persons or entities who are granted immunity under 28 U.S.C. §§ 1602 -1611.

Further, Petitioner's claim that the Fifth Circuit neglected to address his claim of sovereign immunity, is nothing more than an attempt to distract this Court from the actual claims and legal issues in question that were correctly decided by the District Court and affirmed by the Fifth Circuit. Petitioner's assertions of sovereign immunity and violation of his right to travel are not independent causes of action but, instead, appear to be assertions of a defense as to the criminal violations for which the Petitioner was arrested and charged. Instead of addressing issues pertaining to the *real issues* before the court, such as the reasonableness of the actions of the Respondents, Petitioner's writ attempts to misdirect the Court to legal matters and constitutional disputes that bear no relevance to the legal actions brought against any Respondents herein. The real issues before the Court are whether the Respondents should be held liable for a violation of Petitioner's civil rights rather than whether the Petitioner should be found guilty of the criminal offenses of which he was charged.

Finally, Petitioner relies upon two entirely contradictory arguments. First, is the contention that his civil liberties, derivative of the Federal Constitution (Federal law), were violated by Respondents. Second,

he insists that the federal and state laws are not applicable to (or may not be enforced against) him as a result of being a member, by birthright, of the Sovereign American People. Petitioner would have this Court rule that he is entitled to the protections of the laws of the United States and the State of Texas via the Federal Constitution but not subject (or restricted) by the very same federal and state laws. Clearly, this line of thinking does not follow the constitutional framework of our founding fathers and is outrageous in all respects.

Simply put, Petitioner has failed to carry the burden of demonstrating that there are compelling reasons for this Court to grant the Petition. Therefore, the Petition should be denied.

STATEMENT OF THE CASE

This case was brought by pro se Petitioner Daniel Unger (hereinafter "Unger") and arises from a traffic stop, arrest and detention which occurred on or about October 28, 2005, in Elkhart, Anderson County, Texas.

Unger's Complaint consisted of 16 pages of various complaints and claims for damages. (ROA at p. 26-43).[1] Although Unger denies that he is a citizen of the United States of America or the State of Texas, and further denies that he is subject to the jurisdiction of the State of Texas, he nonetheless attempts to state causes of action under 42 U.S.C. §1983 and alternative state law remedies. (ROA at p. 28-29).

1. Respondents will cite to the Record on Appeal by page number, e.g., (ROA at p. ___).

Among his many constitutional claims, Unger has alleged that the actions and/or inactions of the various Respondents constituted violations of his Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment rights; as well as his right to travel and right to liberty. (ROA at p. 26-43). These are all constitutional rights, and Unger alleged violations at virtually every step of the state action.

Unger's case can be simplified by characterizing his complaints against Respondent Sheriff Greg Taylor, Deputy John Smith, Deputy Bryan Chason, and Jailor Zak Montoya into four different phases as follows: 1) Fourth Amendment- Traffic Stop; 2) Fourth Amendment- Detention and Custodial Arrest After Initial Stop; 3) Eighth and Fourteenth Amendments- Conditions of Confinement / Punishment; and 4) Other- including alleged failure to bring Unger immediately before a magistrate and violation of right to travel. Unger's complaint further alleges claims against Respondent, Justice of the Peace Davis as well as against Anderson County.

Respondents moved for summary judgment on all claims based upon qualified immunity, judicial immunity, sovereign immunity and traditional summary judgment standards. (ROA at p. 110). The Court found that Respondents Taylor, Smith, Chason and Montoya were shielded by qualified immunity against all of Unger's claims save two: Unger's claims against Deputy Smith for initiating the traffic stop, and the general denial of bedding against Respondents Sherriff Taylor and Jailor Montoya. (ROA at p. 1111-1127).

The Court further found that Respondent Justice of the Peace Davis was shielded by judicial immunity. (ROA at p. 1111-1127). In addition, the Court granted summary judgment for Anderson County, Texas holding that Unger's state law claims against Anderson County all failed as a matter of law. (ROA at Pg. 1111-1127).

Unger's case proceeded to a trial by jury concerning the above remaining claims. At the conclusion of Unger's case in chief, the court granted a directed verdict for Sheriff Greg Taylor. (ROA at p. 2157-2158; RE at p. 53). The jury, after having heard all the evidence, found in favor of the Respondents. (ROA at p. 233).

STATEMENT OF THE FACTS

On October 28, 2005, Deputy Sheriff John Smith, of the Anderson County Sheriff's Department, was on a routine patrol within the city limits of Elkhart, Anderson County, Texas when he observed a motor vehicle traveling with license plates from the State of Washington. The vehicle's exhaust equipment was excessively loud and Deputy Smith pulled the vehicle over for defective equipment. (ROA at p. 1169-1172).

Deputy Smith asked the driver of the vehicle for his driver's license and proof of liability insurance. The driver responded that he did not have a driver's license or liability insurance. (ROA at p. 1169-1172).

Deputy Smith then asked the driver for his name. The driver stated that his name was Daniel Unger. (ROA at p. 1169-1172).

Deputy Smith asked Daniel Unger for his date of birth. Mr. Unger answered by stating that he was born in 1952 but that he did not use a specific birth day because it was used as a number and could be used to obtain a social security number which would be a violation of Mr. Unger's deeply held religious beliefs of not being numbered. Mr. Unger's deeply held religious belief of not being numbered was also the reason cited for not having a driver's license. (ROA at p. 1169-1172).

Mr. Unger informed Deputy Smith that he was not the owner of the automobile and that the owner's domicile was in the State of Washington. (ROA at p. 1169-1172). Deputy Chason arrived at the scene shortly after Deputy Smith. (ROA at p. 1169-1172).

Deputy Smith frisked and handcuffed Mr. Unger and asked that Deputy Chason transfer Mr. Unger in his patrol car to the Anderson County Jail because Deputy Smith had a K-9 unit which carried a police dog. (ROA at p. 1169-1172).

Mr. Unger was taken to be booked at 11:23 a.m. at the Anderson County Jail on charges of operating a vehicle without liability insurance, operating a vehicle without a valid driver's license, and operating a motor vehicle with defective equipment. (ROA at p. 153).

Unger was held overnight and provided bedding in accordance with Texas Commission on Jail Standards in the Anderson County Jail until arraignments were held the following day. (ROA at p. 447; RE at p. 60). The arraignments for October 28, 2005 had occurred at the jail prior to Mr. Unger's arrival. (ROA at p. 450).

Mr. Unger was taken before Justice of the Peace Carl Davis for arraignment at 1:47 p.m. on October 29, 2005. (ROA at 475). All three charges against Mr. Unger were Class "C" misdemeanors. (ROA at 475). Justice of the Peace Davis asked Mr. Unger to enter a plea. (ROA at 475). Mr. Unger refused to enter a plea and refused to sign the Magistrate and Warning and Finding Regarding Probable Cause. (ROA at 475). Bail was set at $1,500.00 and Mr. Unger was allowed to make a phone call following the arraignment. (ROA at p. 456 & 475-476).

Mr. Unger was released on October 29, 2005 when the $1,500.00 bail was posted.

REASONS FOR DENYING THE PETITION

The decisions below do not conflict with a decision of this Court or any Court of Appeals nor do they implicate a federal question that has not been decided by this Court. Accordingly, Petitioner has not carried the burden of demonstrating any "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10.

I. Petitioner's Assertion of Sovereign Immunity is Not Relevant, Misguided and Not Compelling

A. Sovereign Immunity Bears no Relevance to the Causes of Action Brought Against the Respondents

Unger contends that his timely assertion of sovereign immunity (prior to his arrest) resulted in an unconstitutional arrest, detention and incarceration.

These assertions are clearly absurd and irrelevant to the well settled laws and standards established by this Court.

As Unger's claim of immunity hinges upon his arrest, a careful examination of the well established standards of fourth amendment rights concerning the seizure of the person is essential. An arrest is considered unlawful unless it is made pursuant to a warrant or is supported by probable cause. *Flores v. City of Palacios*, 381 F.3d 391, 402 (5th Cir. 2004). Under Fifth Circuit precedent, "probable cause exists when the totality of facts and circumstances within a police officer's knowledge at the moment of arrest are sufficient for a reasonable person to conclude that the suspect had committed or was committing an offense." *Id.* Although reasonable suspicion is insufficient to justify an arrest, additional facts that develop after a stop may create the probable cause necessary to effectuate an arrest. *United States v. Costner*, 646 F.2d 234 (5th Cir. 1981). The constitutional validity of an arrest turns upon whether the officer had probable cause to make the arrest. *Beck v. Ohio*, 379 U.S. 89, 91, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964).

The issue then becomes whether such a seizure (arrest) was reasonable under the Fourth Amendment as "the essential purpose of the proscription in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials in order to 'safeguard the privacy and security of individuals against arbitrary invasion'" *Delaware v. Prouse*, 440 U.S. 648, 653-54, (1979). The

permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of a legitimate governmental interest. *Id.* at 654.

The reasonableness inquiry under the Fourth Amendment is an objective one. *Ohio v. Robinette*, 519 U.S. 33(1996); *Whren v. United States*, 517 U.S. 806 (1996); *United States v. Causey*, 834 F.2d 1179, 1184 (5th Cir. 1987). "So long as police do no more than they are objectively authorized and legally permitted to do, their motives in doing so are irrelevant and hence not subject to inquiry." *Id.* at 1184. The warrantless arrest of a person is a species of seizure required by the Fourth Amendment to be reasonable. *New York v. Payton*, 445 U.S. 573, 585, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980).

In this case, the constitutionality of the arrest cannot seriously be questioned by the pre-emptive assertion of sovereign immunity by the suspect, Daniel Unger. It remains undisputed that Unger confessed, prior to his arrest, that he did not have a driver's license or liability insurance. (ROA at p. 1169-1172). Each of these offenses constitutes an independent traffic violation of the Texas Transportation Code. TEX. TRANSP. CODE §§ 547.605, 521.021, & 601.051. Texas law provides that any peace officer is authorized to arrest without a warrant any person found committing a traffic violation. *Nite v. State*, 882 S.W.2d 587, 1994 Tex. App. LEXIS 2102 (Tex. App. Houston 1st Dist. 1994); (Tex. Transp. Code Ann. § 543.001); *Tores v. State*, 518 S.W.2d 378 (Tex. Crim. App. 1975); *Irving v. State*, 2002 Tex. App. LEXIS 4404 (Tex. App. Corpus Christi June 20, 2002).

Notwithstanding the absurdity or veracity of Unger's belief that he is immune from the laws of the State of Texas, Unger has failed to present or reference any federal or state statute or case law demonstrating the relevance of a suspect's entitlement to immunity when considering the validity of an arrest. It is clear that Unger's assertion of sovereign immunity is irrelevant to the objective reasonableness standard established by this Court. While immunity may serve as a viable defense, a preemptive assertion of immunity has no relevance to the lawfulness of an arrest or to a consideration of whether a person's civil liberties have been violated. Therefore, even assuming that Unger was entitled to a defense of sovereign immunity, such a holding should not render the arrest and detention a violation of Unger's civil liberties when there was probable cause for the arrest and the officer acted reasonably.

B. Petitioner's Claim of Sovereign Immunity Under 28 U.S.C. §§ 1602-1611 Is Misguided

Unger references the Foreign Sovereign Immunities Act as codified in 28 U.S.C. § 1330 and §§ 1602-1611 as authority for his assertion of immunity and as the foundation of his civil rights claim against Respondents. However, Unger is not entitled to immunity under any such Act.

Section 1602 provides that "[t]he congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and

would protect the rights of both foreign states and litigants in United States courts." 28 U.S.C. § 1602. Petitioner has failed to establish his entitlement to immunity under the Act and provides no valid explanation as to why he should be personally classified as a "foreign state" or an "agency or instrumentality of a foreign state" as defined under § 1603 of the Act.

§1603 of the Act provides, in pertinent part, as follows:

"For purposes of this chapter [28 USCS §§1602 et seq.]—

> (a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity—
>
> > (1) Which is a separate legal person, corporate or otherwise, and
> >
> > (2) Which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

> (3) Which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title nor created under the laws of any third country."

28 USC §1603.

Unger has failed to demonstrate why he should be personally considered a "foreign state" or an "agency or instrumentality of a foreign state." Instead, Petitioner contends that he is a member of the posterity of the "Sovereign American People" by way of a distant relative, John W. Unger, who served as a border ranger and ensign in the American Revolutionary War, and who had taken the Oath of Allegiance to the Commonwealth of Pennsylvania in 1776. Without addressing the validity of Unger's lineage with John W. Unger, Unger has failed to demonstrate the current existence of the Commonwealth of Pennsylvania and how any relation to the Commonwealth of Pennsylvania entitles him, an individual person, to immunity.

In any event, it is clear that the Foreign Sovereign Immunities Act was not intended to provide protections to an American born individual such as Unger. Instead, the Act was intended to establish limitations as to whether a foreign sovereign nation (or its political subdivisions, agencies or instrumentalities) may be sued in a U.S. court—federal or state. Clearly, Unger's sense of entitlement to sovereign immunity from federal and state laws of this nation is misguided. Moreover, Unger has failed to demonstrate any compelling reasons to hear this case.

II. Petitioner's Right to Travel Claim was Appropriately Dismissed as a Matter of Law by the District Court

For the first time, Unger now contends that by birthright, as a member of the sovereign American People (whoever they may be), he should not be required to have a driver's license and proof of insurance, for reason that any such requirement infringes upon his Constitutional right to travel as provided under *Williams v. Fears*, 179 U.S. 270 (1900). Unger's arguments must be rejected on several accounts.

To begin, the constitutionality of Texas state laws requiring Texas driver's to possess a drivers license and financial responsibility (insurance) was not brought into issue via Unger's Original Complaint or via his Petition to the Fifth Circuit Court of Appeals. As such, this Court should not indulge Unger's unmeritorious arguments as they have been made untimely.

Second, the decision of the Fifth Circuit affirming the District Court's dismissal of Unger's right to travel claim is not in conflict with the *Fears* decision as asserted by the Petitioner. The issue before the Court in *Fears* was "whether a state law taxing occupations is invalid so far as applicable to the pursuit of the business of hiring persons to labor outside the state limits because in conflict with the Federal Constitution." *Fears*, 179 U.S. at 274. In dicta the Court references the right of locomotion and the right to move from one place to another as rights secured by the Fourteenth Amendment and by other provisions of the constitution.

Id. at 274. However, the *Fears* Court does not consider whether a state law requiring proper licensing and insurance of drivers is a violation of the 14th Amendment right to exercise free travel. Instead, the *Jones v. Helms*, 452 U.S. 412 (1981) decision, provides a clear framework for a right to travel analysis.

It is well settled that the right to travel is protected by the Constitution, and that the right prevents a state from taxing or penalizing a citizen for exercising the right to leave one state and enter another. *Jones v. Helms*, 452 U.S. 412, 418 (1981). Despite the fundamental nature of the right, a state may prevent a citizen from leaving under certain circumstances, including when probable cause justified an arrest and subsequent detention. *Id.* at 419.

In his complaint, Unger's arguments regarding his right to travel appear to focus more on the alleged violations of his Fourth Amendment rights (ROA, pp 26-43). However, to the extent he intended to assert a violation of his right to travel instead of the seeming allegations of the Fourth Amendment, his right to travel claim is without merit. It is clear, as described above, that the arrest and detention were supported by probable cause on individual independent grounds for at least two traffic violations. Unger does not dispute that he was driving on a Texas public roadway without a driver's license and without liability insurance. Thus, the detention was appropriate because probable cause justified the arrest. Therefore, as a matter of law, Respondents did not violate his right to travel.

Finally, there are, without question, numerous compelling state interests in requiring proper licensing and insurance for Texas motorists who drive on public roadways. Requiring operators of motor vehicles to be properly qualified to drive, via a driver's license, provides safety to the public at large. Likewise, requiring operators of motor vehicles to possess financial responsibility in the form of insurance also provides necessary protections and safeguards to the public at large. Moreover, the restriction of travel by use of such requirements or laws is narrowly tailored to achieve general safety concerns and protections to the general public without entirely prohibiting free travel on public roadways. Any contrary ruling by this Court would cause massive disruption to the general public and the laws of virtually every state in the United States of America.

Therefore, Unger has failed to demonstrate any compelling reasons for this Court to hear this issue nor has he presented any conflicting decisions of this Court or a Court of Appeals.

III. Petitioner's Arguments Ignore the Qualified and Judicial Immunity Framework

Unger's analysis entirely ignores the judicial immunity and qualified immunity defenses asserted by the Respondents. Unger's arguments concerning violations of certain civil rights, must be analyzed in light of the well settled qualified immunity framework.

A. Qualified Immunity

This Court has long held that qualified immunity shields public officials from suit and liability under § 1983, "unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known." *Babb v. Dorman*, 33 F.3d 472 (5th Cir. 1994); *Gibson v. P.A. Rich*, 44 F.3d 274, 277 (5th Cir. 1995). The affirmative defense of qualified immunity is an "immunity from suit, not simply immunity from liability." *Babb*, 33 F.3d at 477. Qualified immunity protects all but the plainly incompetent or those who knowingly violate the law. *Malloy v. Briggs*, 475 U.S. 335, 106 S. Ct. 1092 (1986).

In the context of an arrest, the central question in a qualified immunity inquiry is "the objective (albeit fact-specific) question of whether a reasonable officer could have believed [the arrest] to be lawful, in light of clearly established law and the information the [arresting] officers possessed." A*nderson v. Creighton*, 483 U.S. 635, 641, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987).

Therefore, to defeat qualified immunity, a plaintiff cannot merely allege that the right not to be arrested without probable cause was clearly established. Instead, **a plaintiff must show that the legality of his conduct was clearly established.** In *Sorenson v. Ferrie*, 134 F.3d 325, (5th Cir. 1998) the plaintiff was arrested for possession of a weapon that she kept in the trunk of her car. In granting qualified immunity, the Court held that the plaintiff must demonstrate that, at the time of her arrest, it was clearly established in Texas that one

may lawfully possess a handgun in one's trunk. The Court discussed the relevant statute and case law and found that it was not clearly established that carrying a handgun in the trunk of a car was a violation of the Texas Penal Code Ann. §46.02(a)(unlawfully carrying a weapon), therefore, a reasonable officer could have believed the arrest to be lawful.

In *Saucier v. Katz*, 533 U.S. 194 (2001) the United States Supreme Court instructed that the inquiries for constitutional violations and qualified immunity remain distinct. *Saucier*, 533 U.S. at 204. The Court opined that "it is sometimes difficult for an officer to determine how the relevant legal doctrine...will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances." *Id.* at 205. In that case, the Supreme Court stated that qualified immunity operates as a shield to protect officers if, in fact, a constitutional violation has been committed, but the officer's mistaken belief was reasonable in light of established law. *Id.* at 205-06. The defendant's acts are held to be objectively reasonable unless all reasonable officials in the defendant's circumstances would have then known that the dendant's conduct violated the plaintiff's constitutional right. *Anderson*, 483 U.S. at 641.

Unger asserts that his civil rights were violated based upon an alleged membership of the "Sovereign American People" who are allegedly immune from the jurisdiction of the courts of the United States and

immune from Texas laws requiring that a person have a driver's license and financial responsibility in order to travel on public roadways.

Unger's assertions of immunity and a violation of his civil rights based upon that immunity are outrageous. The legality of his conduct (or his immunity from the laws of the State of Texas) is in no way "clearly established." As such, his arrest was objectively reasonable based upon the information of the arresting officer, Respondent John Smith. Accordingly, the District Court's qualified immunity ruling in favor of the Respondents concerning the arrest and incarceration of Unger was consistent with well established principles of law.

B. Judicial Immunity

Unger also alleges claims against Justice of the Peace Davis for his role in the events at issue. Respondent Davis has asserted judicial immunity as an absolute defense from the Petitioner's claim.

It is well-settled that judicial officers are entitled to absolute immunity from claims for damages arising out of acts performed in the exercise of their judicial discretion. *Boyd v. Biggers*, 31 F3d 279, 284 (5th Cir. 1994). A judge is absolutely immune from liability for his judicial acts even if his exercise of authority is flawed by commission of "grave procedural errors." *Stump v. Sparkman*, 435 U.S. 349, 359 (1978). A judge cannot be deprived of immunity simply because the action or inaction taken was in error, done maliciously, or in excess

of judicial authority. *Id.* Judicial immunity is immunity from suit an not just from the ultimate assessment of damages. *Mireless v. Waco*, 502 U.S. 9, 11 (1991). Plaintiff's cannot overcome judicial immunity through allegations of bad faith or malice, and the immunity applies even when the Judge is accused of acting maliciously or corruptly. *Pierson v. Ray*, 386 U.S. 547, 554 (1967).

Judicial immunity protects a judge against liability for all but non-judicial acts, and judges are subject to liability only when they act in clear absence of all jurisdiction. *Ballard v. Wall*, 413 F.3d 510, 515 (5th Cir. 2005). In determining whether a particular act is "judicial," the court considers four factors: (1) whether it is a function normally performed by the judge, (2) whether the acts occurred in the courtroom or adjunct space such as the judge's chambers, (3) whether the controversy centered around a case pending before the court, and (4) whether the parties dealt with the judge in his official judicial capacity. *Malina v. Gonzalez*, 994 F.2d 1121, 1124 (5th Cir. 1993). In weighing these factors, courts use a functional approach in deciding whether an act is judicial for purposes of immunity, meaning the focus of the immunity analysis is on the nature of responsibilities of the individual official, not that official's rank or title. *Cleavinger v. Saxner*, 474 U.S. 193, 201-03 (1985). Most importantly for the present analysis, judicial immunity extends to Justices of the Peace. *Ammons v. Baldwin*, 705 F.2d 1445, 1447 (5th Cir. 1983).

Unger's claims against Justice of the Peace Carl Davis are unclear at best. Moreover, all of Unger's allegations are rooted in Justice Davis's actions as Justice of the Peace as performed in his official capacity during Petitioner's hearing on October 29, 2005. Justice Davis did not overstep the bounds of a Justice of the Peace's proper role, and his dealings with Unger were strictly in his official capacity. Accordingly, well established principals of law provide that Justice Davis is entitled to judicial immunity.

As previously stated herein, Unger's application for writ of certiorari seeks to distract the Court's attention from the material issues of the case, of which was either determined by a jury in favor of the Respondents or determined by the District Court in favor of Respondents. Unger's assertion of immunity from the laws of the State of Texas has no bearing on the success of Respondent's immunity defenses. Moreover, Unger failed to present any evidence to indicate that the actions of Justice of the Peace Carl Davis were beyond the realm of his judicial capacity. In addition, Unger has utterly failed to demonstrate how the decision of the trial court and the affirmation by the Fifth Circuit Court of Appeals was in conflict with any decisions of this Court or another Court of Appeals. As such, Petitioner's requests should be denied.

IV. Petitioner Improperly Assumes that the Filing of an Unsworn Declaration Alleging Bias and Prejudice Requires Recusal as a Matter of Law

Lastly, Unger contests the district court judge's refusal to recuse himself after Petitioner filed an affidavit alleging bias and moving for the judge's recusal under 28 U.S.C. § 144 and § 455. Section 144 relates to charges of "actual bias." *Henderson v. Dep't of Pub. Safety & Corr.*, 901 F.2d 1288, 1296 (5th Cir. 1990). To proceed under § 144, the movant must present an affidavit that meets the following requirements: "(1) the facts must be material and stated with particularity; (2) the facts must be such that if true they would convince a reasonable man that a bias exists; and (3) the facts must show the bias is personal, as opposed to judicial, in nature." *Id.* Under § 455, a judge must recuse himself "in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). The standard is "whether a reasonable person, with full knowledge of all of the circumstances, would harbor doubts about the judge's impartiality." *Matassarin v. Lynch*, 174 F.3d 549, 571 (5th Cir. 1999).

Unger's affidavit essentially alleges that the district court judge was biased because of his unfavorable rulings on numerous nonmeritorious motions, objections, and complaints. Because the alleged bias is "judicial," rather than "personal" in nature, the facts alleged do not meet the requirements for a § 144 affidavit. *See Davis v. Bd. of Sch. Comm'rs of Mobile County*, 517 F.2d 1044, 1051 (5th Cir. 1975) (explaining that the alleged bias was not extra-judicial, but "very

much judicial," since the movants were complaining of language in an order and an opinion). Neither do the allegations show that a reasonable person would doubt the district court judge's impartiality. As such, the district court did not abuse its discretion in denying Petitioner's motion.

Unger's "Argument for Allowance of Writ" provides no explanation of how the Fifth Circuit's Opinion affirming the District Court's denial of Petitioner's motion for recusal of the district judge was is in conflict with a decision of this Court or a Court of Appeals, and has further failed to claim that the Fifth Circuit's ruling implicates an important federal question that has not been settled by this Court. Therefore, Unger's writ should be denied.

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the Petition. Therefore, Respondents respectfully request that the Petitioner be denied.

Respectfully submitted,

J. KEITH STANLEY
Counsel of Record
C. VICTOR HALEY
W. WADE FLASOWSKI
FAIRCHILD, PRICE, HALEY & SMITH
P.O. Drawer 631668
Nacogdoches, Texas 75963
(936) 569-2327
kstanley@fairchildlawfirm.com

Counsel for Respondents